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Supreme Court, U.S.
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NO. 04-621

IN THE SUPREME COURT OF THE UNITED STATES

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, A MUNICIPAL CORPORATION OF THE STATE OF WASHINGTON,

Petitioner,

v.

DYNEGY POWER MARKETING, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF WASHINGTON, ARIZONA, ARKANSAS, HAWAII, ILLINOIS, IOWA, KENTUCKY, LOUISIANA, MINNESOTA, MISSOURI, MONTANA, NEW MEXICO, OKLAHOMA, OREGON, SOUTH CAROLINA, UTAH, AND WEST VIRGINIA AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

The Federal Power Act authorizes the Federal Energy Regulatory Commission to regulate the interstate wholesale sale of energy and provides that utilities shall file schedules showing all rates and charges for any transmission or sale of electricity.

1. Does the Federal Power Act preempt state laws that provide a remedy for antitrust violations, fraud, or deceptive practices under state consumer protection law related to the interstate sale or transmission of wholesale electricity?

2. Does the "filed rate doctrine" bar application of state laws that provide a remedy for antitrust violations, fraud, or deceptive practices when no rate schedules were filed with the Federal Energy Regulatory Commission and the wholesale price of electricity was set by the sellers in the exercise of their market power?

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ACRONYMS

CPA – Washington Unfair Business Practices And Consumer Protection Act

FCC – Federal Communications Commission

FERC – Federal Energy Regulatory Commission

FPA – Federal Power Act

ICC – Interstate Commerce Commission

ISO – Independent System Operator

RICO – Racketeer Influenced And Corrupt Organization Act

INTEREST OF AMICI CURIAE

Washington and the other amici states have two important interests in the outcome of this case. The first is the ability of states to enforce state laws enacted to prevent fraud and protect consumers and is shared by all amici states. The second interest pertains to those western states directly harmed by the energy crisis of 2000-2001 and involves their ability and the ability of their citizenry to redress the particular harms.

A. State Enforcement Authority

The first interest is the ability of states to enforce state laws enacted to prevent fraud and protect consumers. For example, Washington historically has protected its citizens by means of various statutes, including the Washington Unfair Business Practices–Consumer Protection Act, Wash. Rev. Code 19.86 (CPA); the Washington Criminal Profiteering Act, Wash. Rev. Code 9A.82; and other statutory and common laws. The CPA includes both antitrust and consumer protection provisions.[1] The Washington Attorney General is empowered to obtain civil penalties, restitution, injunctive relief, and costs and attorneys fees for violations of the CPA.[2] The Washington Criminal Profiteering Act is

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[1] Wash. Rev. Code 19.86. The consumer protection provisions of the Washington statute are analogous to Cal. Bus. & Prof. Code § 17200, while the antitrust provisions are similar to Cal. Bus. & Prof. Code § 16720 (the Cartwright Act). Both of the California statutes were bases for the petitioner's claims.

[2] Wash. Rev. Code § 19.86.140 provides that violations of Wash. Rev. Code § 19.86.030 (prohibiting contracts, combinations, or conspiracies in restraint of trade) and Wash.

analogous to the federal Racketeer Influenced And Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961-1968. Under the Criminal Profiteering Act, an individual or corporation is civilly liable for a pattern of conduct violating certain enumerated criminal offenses. A pattern is at least three related acts within five years. Wash. Rev. Code § 9A.82.010(12).

This interest is particularly significant in the area of the sale of electric energy. State law could redress a wide range of fraudulent activities that have taken place. In addition to the applicability of state consumer protection laws, the criminal guilty pleas entered by former Enron traders Timothy Belden, Michael Richter, and John Forney[3] contain statements that would support a civil action under the Criminal Profiteering Act. Although the pleas themselves are to conspiracy to commit federal wire fraud, which is not a predicate offense under the state statute, each of the defendants made statements in their plea agreements potentially inculpating them in the state law crimes of theft and

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Rev. Code § 19.86.040 (prohibiting monopolization and attempts to monopolize) are punishable by civil penalty of up to $500,000 per violation, and that violations of Wash. Rev. Code § 19.86.020 (prohibiting unfair methods of competition and unfair or deceptive acts or practices) are punishable by civil penalty of up to $2,000 per violation.

[3] Three key Enron traders have recently entered guilty pleas in which they have admitted engaging in fraudulent activities. *United States v. Belden*, No. CR-02-0313- MJJ (D.C. N.D. Cal. 2002); *United States v. Richter*, No. CR-03-0026-MJJ (D.C. N.D. Cal. 2003); *United States v. Forney*, No. CR-03-0178-MJJ (D.C. N.D. Cal. 2004).

money laundering. Each of those is a predicate offense supporting a civil Criminal Profiteering Act claim for penalties for each pattern of conduct established and for injunctive relief.

In contrast to the broad state authority over fraudulent and deceptive practices, the Federal Energy Regulatory Commission (FERC) has jurisdiction only over transmission and over buyers and sellers of wholesale electricity in interstate commerce, and then, only as to rates and conditions of sales at wholesale.[4] Those harmed by even the most egregious conduct by the sellers cannot seek complete redress from FERC, nor is there any remedy for them under federal statutes.[5]

Despite this limited FERC jurisdiction, the Ninth Circuit held that such FERC authority displaces the broadly applicable state law. The Ninth Circuit's decision limits or abolishes the states' ability to pursue penalties, injunctive relief, or restitution from companies that have engaged in unfair, misleading, deceptive, or fraudulent conduct. If the decision below is allowed to stand, the states and their citizens are left without any effective

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[4] *See New York v. FERC*, 535 U.S. 1, 11 (2002).

[5] In a very technical sense, FERC can issue refunds to "any person" complaining of a violation of the Federal Power Act [FPA]. 16 U.S.C. § 825e. However, this remedial authority is limited to violations of the FPA and does not encompass state consumer protection act violations or other state law violations. *See generally* U.S. General Accounting Office, *Energy Markets: Concerted Actions Needed By FERC To Confront Challenges That Impede Effective Oversight* (GAO-02-656) (June 2002).

remedy to market manipulation in the buying and selling of electricity.

B. Recovery For Harm

A second and related interest in these issues arises from the fact that Washington and some of the amici states are within the western interconnection, so-called because it is a single, large geographic market in which electricity is bought and sold at wholesale and can be moved via the physical interconnections across the grid.[6] During the western energy crisis of 2000-2001, prices soared to levels far above their normal, historic levels.[7] To a substantial degree, these skyrocketing energy prices were the result of fraud on the part of energy companies.[8] In addition, FERC has made public voluminous data from various proceedings arising from the western energy crisis[9] that include

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[6] FERC has recognized that the states in the western interconnection effectively are in the same market. *San Diego Gas & Elec. Co. v. Sellers Of Energy & Ancillary Servs. Into Markets Operated By The California Indep. Sys. Operator Corp. & The California Power Exchange*, 95 FERC 61,418, at *6 (June 19, 2001) ("There is a critical interdependence among the prices in the [Independent System Operator]'s organized spot markets, the prices in the bilateral spot markets in California and the rest of the west, and the prices in forward markets.").

[7] *See, e.g.*, U.S. Senate Committee On Commerce, Science & Transportation, Testimony of Robert McCullough, Apr. 11, 2002 (http://commerce.senate.gov/hearings/041102 McCullough.pdf).

[8] *See supra* note 3.

[9] *E.g., American Elec. Power Serv. Corp. v. Sellers Of Energy & Ancillary Servs. Into Markets Operated By The California Indep. Sys. Operator Corp. & The California Power Exchange*, 107 FERC 61,108 (May 5, 2004).

disclosures demonstrating that certain energy companies sold into amici states using schemes colorfully named "Death Star"[10] and "Ricochet"[11] transactions, among others. These fraudulent practices severely harmed the businesses and citizens of these amici states. Accordingly, these states have a substantial interest in seeing that there is an effective means to redress these injuries.

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[10] "Death Star", also known as a "circular schedule", refers to a scheme in which power is scheduled across transmission lines forming a closed loop with parts of the loop being in different control areas. This scheme was run to take advantage of transmission congestion on California transmission lines. The California Independent System Operator (ISO) paid generators to decongest lines by sending power in the opposite direction from the congestion. The ISO considered a line decongested if a seller scheduled power on it in the direction opposite the congestion and would pay the seller based only on the schedule. This led Enron and others to begin submitting looping schedules creating the illusion of decongestion—and getting paid for the illusion—then canceling the schedule before sending any power. In order to run a circular schedule, the scheduler must misrepresent the origin or destination of the power and the scheduler's intention to provide the power. The schedule is cancelled before any power flows, making the entire thing illusory and leaving customers to pay millions for nothing. *See* FERC, *Final Report On Price Manipulation In Western Markets: Fact-Finding Investigation Of Potential Manipulation Of Electric And Natural Gas Prices*, Docket No. PA02-2-000, at VI-26 (Mar. 2003) (*FERC 2002 Final Report*).

[11] "Ricochet" refers to a practice sometimes called "megawatt laundering". In a Ricochet, a seller in the California ISO control area will send power out of the control area, then immediately bring it back, misrepresenting it as having originated from an out of area generator, and thus, avoiding mandatory price caps in place in California. *FERC 2002 Final Report* at VI-17.

The amici states within the western interconnection have a strong interest in supporting their own ability, and the ability of their citizens, to recover for the serious harms they have suffered from market abuses brought about by manipulation of an essentially unregulated wholesale electricity market. All amici states have a substantial interest in their ability to enforce their laws for the protection of their consumers, including the various state consumer protection laws, state RICO statutes such as Washington's Criminal Profiteering Act, and other laws of general application intended for the benefit and protection of consumers. Accordingly, we submit this amicus brief to focus the Court's attention on important threats to the authority of the states to enforce their laws and protect their businesses and consumers.

ARGUMENT

The Ninth Circuit's decision below liberally cites to and incorporates the holdings and reasoning expressed in three other Ninth Circuit decisions. *People of California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831 (9th Cir. 2004); *Pub. Util. Dist. 1 of Grays Harbor County, Washington v. Idacorp, Inc.*, 379 F.3d 641 (9th Cir. 2004); *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004). These four decisions hold that state law remedies for fraud in the interstate sale of energy are preempted by the Federal Power Act, 16 U.S.C. §§ 791a-828c, and the filed rate doctrine. Under the analysis adopted and approved by the Ninth Circuit, states would be prevented from enforcing material provisions of state law used to protect consumers and businesses against predatory and fraudulent

practices. Such a result would severely and unduly injure all amici states.

The Court should grant review for three reasons. First, the decision below conflicts with various decisions of the United States Court of Appeals for the Fifth Circuit, including *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987), and *In re Mirant Corp.*, 378 F.3d 511 (5th Cir. 2004), a recent decision relying on *Gulf States*. Second, there is substantial tension between the Ninth Circuit's analysis in the decision below and this Court's decisions in *Maislin Industries, U.S., Inc., v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994). Third, under the Ninth Circuit's analysis, states would be unable to pursue even the most egregious wrongdoers for violations of their state consumer protection laws. These laws are broadly applicable across a range of businesses and practices where more pervasive regulations are not in place. They serve as the foundation of the states' interest in ensuring markets operate competitively and consumers are protected. The decision below bars enforcement of these laws, even where FERC is not expressly preempting state action and the violations have only an indirect connection to rates.

A. The Ninth Circuit Decision Is In Conflict With The Fifth Circuit Decisions In *Gulf States Utilities Co. v. Alabama Power Co.* And *In Re Mirant Corp.*

This Court should accept review to resolve a conflict between the circuits. The Ninth Circuit held that the Federal Power Act preempted enforcement

of state consumer protection laws designed to ensure the operation of a fair market, even when FERC has implemented a "market-based" system of establishing rates. The Ninth Circuit phrased the question as "whether, under the market-based system of setting wholesale electricity rates, FERC is doing enough regulation to justify federal preemption of state laws". *Pub. Util. Dist. 1 of Snohomish County, Washington v. Dynegy Power Marketing, Inc.*, 384 F.3d 756, 760 (9th Cir. 2004). The court below concluded that FERC was adequately engaged in regulation, citing "umbrella tariffs" that authorize sellers to sell at market rates, the filing of quarterly reports that permit FERC (and presumably customers of the sellers and the public) to ascertain the reasonableness of the rates, and more detailed tariffs of the California Power Exchange and the California Independent System Operator.

In contrast to the preemption analysis applied by the Ninth Circuit, the Fifth Circuit has consistently reached a very different conclusion. This conflict turns on very different views of the scope and effect of federal preemption. The Ninth Circuit has impermissibly expanded that analysis; the Fifth Circuit has correctly applied a more limited test. Instead of the blanket preemption conclusion reached by the Ninth Circuit, the Fifth Circuit has recognized that FERC jurisdiction does not preclude all other actions.

Gulf States involved an application by Gulf States Utilities Company for issuance of bonds to finance refunding of part of the utility's outstanding debt. Two intervening cities opposed issuance of the bonds because they would be used for an

anticompetitive purpose. The Federal Power Commission denied the objection, declined to hold a hearing on the anticompetitive effects of the bond issuance, and approved issuance of the bond. Intervenors appealed, and the Fifth Circuit remanded the case to the Federal Power Commission for a hearing to consider the anticompetitive impact of the bond issuance.

The Fifth Circuit wrote: "[T]he FPA [Federal Power Act] would not necessarily forbid the district court to set aside contracts obtained unconscionably or by fraud" in an action challenging certain contracts for the sale and purchase of wholesale electric power sold in interstate commerce. *Gulf States*, 824 F.2d at 1472. The court found that "[t]he district court would have jurisdiction if [plaintiff] claimed that it cannot take Southern's electricity *regardless of price*." *Id.*

Following *Gulf States*, *In re Mirant Corp.* was a bankruptcy case in which a Chapter 11 debtor-in-possession moved for an order authorizing rejection of an executory power purchase contract. The bankruptcy court ultimately denied the motion and the debtor appealed.

The Fifth Circuit stated the issue as "whether a district court may authorize the rejection of an executory contract for the purchase of electricity as part of a bankruptcy reorganization, or whether Congress granted [FERC] exclusive jurisdiction over these contracts". *In re Mirant Corp.*, 378 F.3d at 514.

The court found that preemption did not bar a court from determining whether a contract had been breached. *Id.* at 519. The court wrote:

> "Outside of the bankruptcy context, the FPA does not provide FERC with exclusive jurisdiction over the breach of a FERC approved contract. While the FPA does preempt breach of contract claims that challenge a filed rate, district courts are permitted to grant relief in situations where the breach of contract claim is based upon another rationale. *Gulf States Utils. Co. v. Ala. Power Co.*, 824 F.2d 1465, 1471-73 (5th Cir. 1987); *see also Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579 n.9, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981) (declining to disturb a state court decision holding that a party breached a contract that was subject to FERC regulation by failing to comply with state laws that also applied to that contract). For example, *Gulf States* held that the FPA would preempt any breach of contract claim where damages were sought because a lower rate would have been filed with FERC absent the breach, but there is no preemption if damages were sought because the breach caused an increase in the quantity purchased at the filed rate. *Gulf States*, 824 F.2d at 1471." *In re Mirant Corp.*, 378 F.3d at 519.

In sum, while the Fifth Circuit continues to hold that FERC does not have exclusive jurisdiction over FERC approved rates, the Ninth Circuit held that *all* issues pertaining to FERC jurisdictional contracts are preempted and within the exclusive jurisdiction of FERC. *Pub. Util. Dist. 1 of Snohomish County, Washington v. Dynegy Power Marketing, Inc.*, 384 F.3d 756, 762 (9th Cir. 2004). Quoting its

decision in *People of California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 852 (9th Cir. 2003), the Ninth Circuit stated:

> "We said: 'remedies for breach and non-performance of FERC-approved operating agreements in the interstate wholesale electricity market fall within the exclusive domain of FERC.'" *Snohomish County*, 384 F.3d at 762.

This is a significant conflict that requires resolution by this Court. Particularly in this time of transition in the regulation of electric markets and service, the scope of federal preemption is a critical issue since it necessarily sets out the limits of the states' ability to enact and enforce laws to protect their citizens.

B. The Ninth Circuit's Filed Rate Analysis Is In Substantial Tension With This Court's Rulings In *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.* And *MCI Telecommunications Corp. v. AT&T*

The Ninth Circuit's preemption analysis is in substantial tension with this Court's rulings in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994). Both cases involved the power of a regulatory agency to deviate from the statutory requirement to require filed tariffs that provide predictability, stability, and non-discriminatory treatment to all participants in their respective markets.

Maislin Industries arose under the Interstate Commerce Act, a statute that, like the Federal Power Act, required common carriers to publish rates in tariffs filed with a regulatory agency, the Interstate Commerce Commission (ICC). 49 U.S.C. § 10762. The ICC had adopted a policy allowing carriers to privately negotiate lower rates amongst themselves. Where such a negotiated rate existed, the carriers were relieved from their obligation to adhere to the filed tariff.

The case arose from a bankruptcy in which the estate sought the difference between a lower rate negotiated pursuant to that policy and the higher filed rate. The estate argued that the ICC could not lawfully depart from the filed rate and that such secretly negotiated rates were discriminatory and violated the Interstate Commerce Act. This Court held that the ICC could not properly allow interstate carriers to privately negotiate rates different than those in the filed tariff.

MCI arose under the Federal Communications Act, a statute requiring telephone carriers to adhere to a filed rate. As with FERC in the instant matter, the Federal Communications Commission (FCC) sought to reduce regulation and open rates within its jurisdiction to the open market by making adherence to a filed tariff optional. The FCC argued that this was within its statutory authority to modify the tariffing requirements.

On appeal, this Court rejected the FCC's argument and held that the FCC could not properly eliminate filed tariffs in favor of a purely deregulated scheme that opened rates to the free market without oversight.

The instant case has much in common with both *Maislin Industries* and *MCI*. Here, the Ninth Circuit held that the filed rate doctrine precluded the cause of action of the petitioner—even though no specific rate was ever filed with FERC. This is inconsistent with *Maislin Industries* and *MCI* which hold that the agencies could not eliminate the filed rate. The court of appeals does not address either case in the decision below. However, in another case arising from the western energy crisis, the Ninth Circuit explained its preemption and filed rate analysis in more detail, seeking to distinguish *Maislin Industries* and *MCI*. In *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004),[12] the Ninth Circuit wrote:

> "However, the regulatory scheme before us is different from those under consideration in *MCI* and *Maislin*. The agencies in *MCI* and *Maislin* relied on market forces alone in approving market-based tariffs. In contrast, FERC's system consists of a finding that the applicant lacks market power (or has taken sufficient steps to mitigate market power), coupled with strict reporting requirements to

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[12] The Ninth Circuit currently has before it petitions for rehearing in *California ex rel. Lockyer v. FERC*.

> ensure that the rate is 'just and reasonable' and that markets are not subject to manipulation." *California ex rel. Lockyer*, 383 F.3d at 1013.

The "strict reporting requirements" are after the fact quarterly filings that do not meet the test of *Maislin Industries* and *MCI*. Because the market-based rate system of FERC does not protect the public in the same way as a true "filed rate", as supported by *Maislin Industries* and *MCI*, the privately negotiated rates disapproved in *Maislin Industries* are little different from the privately negotiated sales under FERC's market-based regime. The point here is not to attack, as a matter of law, the validity of the market-based rate system of FERC.[13] Rather, the point is that, where such a system has been implemented, it is inconsistent with this Court's precedents to restrain the operation of state laws, such as those of the amici states, that are designed to protect consumers and ensure the competitiveness of markets.

If the Ninth Circuit decision stands, amici states and the citizens and businesses that depend on them are left in the worst of all worlds—electricity markets proven to be subject to anticompetitive and fraudulent activities, but lacking the basic structural and behavioral remedies common to all other markets.

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[13] The question of the legality of market-based rates is being pursued in the United States Court of Appeals for the District of Columbia Circuit in *Colorado Office of Consumer Counsel v. FERC*, No. 04-1238 (filed July 16, 2004).

C. The Questions In This Case Are Important Because State Consumer Protection Laws Provide A Remedy For Fraud And Consumer Protection Violations That FERC Does Not

FERC has jurisdiction over interstate buyers and sellers of wholesale electricity. Though the FPA provides remedies to such buyers and sellers, the real harm inflicted by the manipulation of wholesale markets goes beyond just immediate buyers. It impacts businesses and citizens who buy electricity at retail, in transactions beyond the scope of FERC authority.

By contrast, Washington's Unfair Business Practices And Consumer Protection Act, Wash. Rev. Code 19.86, provides protections and remedies to all those who are harmed by malfunctioning markets. It authorizes the recovery of treble damages in appropriate cases, in addition to restitution, disgorgement, and injunctive relief. In addition, the state is entitled to recover civil penalties, including penalties up to $2,000 for each violation of the consumer protection provisions and up to $500,000 for each violation of the antitrust provisions.[14]

The Ninth Circuit's conclusion that state law, and thus, state law remedies for harm inflicted by FERC jurisdictional sellers of wholesale electricity, are preempted by FERC leaves the citizens of all of the amici states without any protection under state law. Those amici states within the western interconnection represent consumers who were truly

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[14] Wash. Rev. Code § 19.86.140.

harmed during the energy crisis, and the Ninth Circuit decision precludes those amici states from pursuing a remedy for that harm. Nothing in the legislative history of the FPA supports this sweeping abolition of state authority to enforce consumer protection laws or to seek redress on behalf of their citizens.

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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